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18 REED, and COASTAL PROTECTION
RANGERS, INC.
19

20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
22

23 CORY SPENCER, an individual;
24 DIANA MILENA REED, an
individual; and COASTAL
25 PROTECTION RANGERS, INC., a
26 California non-profit public benefit
corporation,
27

28 Plaintiffs,

CASE NO. 2:16-cv-02129-SJO (RAOx)
**PLAINTIFFS' REPLY IN SUPPORT
OF ITS MOTION FOR
ADMINISTRATIVE RELIEF
PURSUANT TO FRCP 56(d)**

1
2 v.

3 LUNADA BAY BOYS; THE
4 INDIVIDUAL MEMBERS OF THE
5 LUNADA BAY BOYS, including but
6 not limited to SANG LEE, BRANT
7 BLAKEMAN, ALAN JOHNSTON
8 AKA JALIAN JOHNSTON,
9 MICHAEL RAE PAPAYANS,
10 ANGELO FERRARA, FRANK
11 FERRARA, CHARLIE FERRARA,
and N. F.; CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE JEFF
KEPLEY, in his representative
capacity; and DOES 1-10,

12 Defendants.
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Judge: Hon. S. James Otero
Date: September 5, 2017
Time: 10:00 a.m.
Crtrm.: 10C

Complaint Filed: March 29, 2016
Trial Date: November 7, 2017

1 **I. INTRODUCTION**

2 Defendants¹ do not dispute they delayed or altogether failed to produce
3 relevant documents, and that they moved for summary judgment while doing so.
4 Defendants should not gain from these untoward tactics, and this Court should deny
5 Defendants' Motions for Summary Judgment while critical discovery remains
6 outstanding.

7 **II. ARGUMENT**

8 **A. Plaintiffs Diligently Sought Relevant Discovery From Defendants.**

9 Defendants' oppositions present a lop-sided view of their discovery abuses
10 and gamesmanship. Defendants argue that Plaintiffs are to fault for not diligently
11 pursuing discovery. Not so. And, their arguments are completely contradicted by
12 the facts and by Magistrate Judge Oliver's recent observation:

13 I don't take very well the response that, 'Well,' somehow this is the
14 plaintiffs' fault. You have obligations to -- as an officer of the court to
15 respond to these discovery requests, to exercise due diligence, and to
16 speak to your client. So -- and I recognize that the discovery in this
17 case has been complicated and it's involved multiple individuals and
18 we've had multiple telephonic conferences on this, but I guess I just -- I
19 don't -- ***arguments somehow pushing back on the plaintiff are not
well received*** when it looks like there just -- there hasn't been the same
20 -- the thoroughness [by Defendants] that, I think, had it been done in
21 the first place, would have avoided some of the issues.

22 Wolff Decl., Exh. C at 19:16-24 (emphasis added).

23 For instance, with respect to the City, Plaintiffs regularly met and conferred in
24 the spring and throughout the summer to address the City's production shortfalls.

25 Wolff Decl., ¶¶ 2, 4-6. Counsel discussed categories of documents that were
26 missing from productions, including texts and emails from City-issued and personal
27 devices of City employees. *Id.* While it is true the City informed Plaintiffs in late
28

¹ Only Defendants Papayans, Blakeman, Charlie Ferrara, Frank Ferrara, and the City
of Palos Verdes Estates opposed Plaintiffs' motion under Rule 56(d).

1 December 2016 that they would not produce work-related communications on
2 police officers' personal devices, it was not until June 22, 2017 that Plaintiffs
3 learned via the deposition of Sergeant Barber that police officers actually use their
4 personal cell phones for work. Wolff Decl., Exh. B at 85:17-86:9. But the City
5 refused to produce work-related texts on privacy grounds and never took steps to
6 collect and preserve relevant data on officers' phones. *Id.*, at 88:22-25, 222:14-22.

7 Plaintiffs sought assistance from Magistrate Judge Oliver regarding the
8 personal police devices on July 25, though the Court was unable to address this
9 issue due to time constraints. Wolff Decl., ¶ 10. Magistrate Judge Oliver suggested
10 the parties select a future date for a hearing. *See* Wolff Decl., Exh. C, at 5:3-14.
11 But Defendants filed eight summary judgment motions later that day, and thus any
12 further meeting and conferring over discovery violations was simply not practical.

13 Similarly, and as is set forth in detail by Defendant Papayans, Plaintiffs have
14 taken exhaustive measures to obtain Papayans' cell phone data, to no avail.
15 Papayans' argument that his production could not have been completed on time is
16 irrelevant, because he has a duty to supplement under Rule 26(e)(1)(A), which is not
17 relieved by the discovery cut-off. Further, he took insufficient steps to preserve and
18 obtain relevant evidence at the outset of this litigation.

19 Charlie and Frank Ferrara, like the City and Defendant Papayans, dragged
20 their feet in an effort to run out the clock on discovery while withholding (and
21 spoliating) critical evidence. Unlike the City and Papayans, however, the Ferraras
22 make the fanciful claim that they "made a complete production of documents before
23 Plaintiffs were required to oppose the Ferraras' MSJs." Dkt. No. 407, at 8:17-19.
24 Nothing could be further from the truth. The Ferraras had to be ordered by the
25 Court to produce documents, and even then, violated the order with delayed and
26 incomplete productions. An almost entirely-redacted production, two court days
27 before Plaintiffs' opposition deadline, hardly constitutes "a complete production" in
28 advance of Plaintiffs' opposition deadline. Wolff Decl., ¶ 12. Plaintiffs require

1 additional time to continue their fight to acquire responsive information that the
2 Ferraras were already ordered to produce.²

3 **B. The Withheld Documents Bear Directly On Plaintiffs' Claims And**
4 **Are Discoverable.**

5 The cell phone records sought by Plaintiffs with respect to this Rule 56(d)
6 motion directly relate to Plaintiffs' claims. As an example, both Charlie Ferrara and
7 Blakeman were involved in the assault on Plaintiff Reed, and Blakeman was
8 involved in the assault on Plaintiff Spencer. Plaintiffs are entitled to review Charlie
9 Ferrara's cell phone records, as properly produced, prior to any ruling on
10 Blakeman's summary-judgment motion, to identify communications Charlie Ferrara
11 and Blakeman may have had regarding the assaults.

12 Similarly, Officer Barber admitted that he is friendly with the Bay Boys and
13 attends social functions with them. *See, e.g.,* Wolff Decl., Exh. B at 71:12-72:3.
14 Officer Barber also admitted that police officers use their personal cell phones to
15 exchange work-related texts while on duty. *Id.* at 88. Plaintiffs should be permitted
16 additional time to compel and review these relevant messages. These facts are
17 sufficient to meet the requirements under Rule 56(d) that "some basis for believing
18 that the information sought actually exists."

19 Additionally, these records are discoverable. Despite the City's refusal to
20 produce relevant information from police officers' personal devices, the City stops
21 short of arguing that Plaintiffs are not entitled to this information. The
22 discoverability of this information is indisputable. *See City of San Jose v. Superior*

23
24 ² The Ferraras' argument in footnote 3 is indicative of their improper view of their
25 discovery obligations. Ferraras' Opp'n, at 6, n. 3 ("It is perplexing why Plaintiffs
26 did not pursue other formal efforts to obtain the cellular phone records of the
27 Ferraras.") They apparently argue they can shirk their discovery duties so long as
28 other methods of discovery are available. They do not cite any case law for this
argument, it is wrong on its face, and is further evidence of discovery misconduct.

1 *Court*, 2 Cal. 5th 608, 614, 626 (2017). And while the City argues that its
 2 production of such information would violate the officers' collective bargaining
 3 agreement, a contract that violates the law is null and void. Cal. Civ. Code § 1608.

4 **C. Plaintiffs' Motion Was Timely And Properly Brought.**

5 Nothing in the Federal Rules supports the City's argument that Plaintiffs
 6 should have sought relief under Rule 56(d) while opposing the its summary-
 7 judgment motion. Rather, "implication and logic require that a Rule 56(f) motion be
 8 made prior to the summary judgment hearing," which Plaintiffs here did. *Ashton-*
 9 *Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th Cir. 1990). Further, the City continues
 10 to produce documents even after briefing on its summary-judgment motion has
 11 closed. Wolff Decl., ¶ 11.

12 The City's citations to *Cornwell v. Electra Central Credit Union*, 439 F.3d
 13 1018, 1027 (9th Cir. 2006) and *Rivera-Torres v. Rey-Hernandez*, 502 F.3d 7, 10-11
 14 (1st Cir. 2007) are unavailing. *Cornwell* involved a motion to reopen discovery and
 15 did not conduct an analysis under Rule 56(d). And in *Rey-Hernandez*, a First
 16 Circuit district court *granted* a request for an extension of time to respond to
 17 summary judgment. Only after repeated motions for extensions, totaling nearly a
 18 year, did the district court finally deem the motion for summary judgment
 19 unopposed. *Id.* These cases shed no light on the situation at hand.

20 Blakeman, too, relies on irrelevant authority and makes inapplicable
 21 arguments. For instance, Blakeman cites to *Nidds v. Schindler Elevator Corp.*, 113
 22 F.3d 912, 921 (9th Cir. 1996), in support of his opposition, but in *Nidds*, the Court
 23 *granted* a continuance to the Plaintiff to allow him time to conduct discovery, but
 24 the Plaintiff did not avail himself of discovery during the continuance. *Id.*
 25 Blakeman also argues that Plaintiffs should have moved to amend the scheduling
 26 order, but there is nothing procedurally improper about Plaintiffs' request under
 27 Rule 56(d). Nor was it clear sufficiently in advance of the close of discovery that
 28 Defendants would shirk their discovery obligations, given the Court had ordered

1 certain Defendants to produce documents and others had agreed to do the same.

2 **D. Defendants Will Not Suffer Prejudice.**

3 Defendant Blakeman argues that he will be prejudiced by the grant of
4 Plaintiffs' Rule 56(d) motion. But there exists a far greater risk of prejudice and
5 miscarriage of justice if this Court were to grant summary judgment to Defendants
6 despite their concealing of relevant evidence.

7 **E. Defendants' Attempts To Reargue Their Summary Judgment
8 Motions Are Improper and Misplaced.**

9 The Ferraras and Blakeman attempt to rehash their summary-judgment
10 arguments in response to Plaintiffs' Rule 56(d) motion. These arguments are
11 misplaced and, in some instances, bizarre.³

12 **III. CONCLUSION**

13 This Court should grant Plaintiffs' Rule 56(d) motion and deny Defendants'
14 Motions for Summary Judgment. In the alternative, the Court should allow
15 Plaintiffs the time to obtain the improperly-withheld discovery before ruling on
16 Defendant's Motions for Summary Judgment.

17 DATED: August 22, 2017

HANSON BRIDGETT LLP

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19
20 By: /s/ Kurt A. Franklin

KURT A. FRANKLIN

21 Attorneys for Plaintiffs
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24 ³ For instance, Blakeman admits that Defendant Lee called him 62 times the day of
25 Plaintiff Spencer's assault but argues that there was no conspiracy because the
26 communications occurred after the assault. Blakeman Opp'n at 8:19-27. Blakeman
27 cites no case law that communications in furtherance of a conspiracy must occur
28 before an assault. Nor is this argument relevant to a Rule 56(d) analysis.